Supreme Court, U.S.
FILED

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No. _____

IN THE
Supreme Court of the United States

SWEE FOON CHONG,
Petitioner

v.

ERICH H. HOLDER Jr.,
United States Attorney General,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR
THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether or not the designation of the country of removal made by the Immigration Judge (IJ) in its decision violated the procedure set forth in 8 CFR 1240.10(f) and INA § 241(b)(2) [8 USC 1231(b)(2)], and the Court of Appeals in upholding the IJ decision thereby decided an important question of federal law in a manner that conflicts with the said laws, the constitution, and existing jurisprudence, which would calls for the exercise of this Court's supervisory power.

CORPORATE DISCLOSURE STATEMENT

None of the parties are corporations. Sup. Ct. R. 29.6.

TABLE OF CONTENTS

Question Presented i

Corporate Disclosure ii

Table of Contents iii

Table of Authorities v

Petition for Writ of Certiorari 1

Decision Below 1

Jurisdiction 1

Statutes and Regulations Involved 1

Statement of the Case 2

Reasons for Granting the Writ 4

The writ should be granted because the Court of Appeals has decided an important question of federal law in a manner that conflicts with the constitution, law and relevant jurisprudence and the same calls for the exercise of this Court's supervisory power..... 4

Conclusion 10

Appendix 1a

Court of Appeals Summary Order 1a
Court of Appeals Oct. 20, 2010 Order..... 5a
BIA Decision 7a
Immigration Court Decision 13a
Statutory Provisions Involved.....43a
CFR Regulations.....44a

TABLE OF AUTHORITIES

Cases

Ali v Ashcroft, 346 F.3d 873
(9th Cir. 2003)..... 7

El Himri vs Ashcroft, 378 F.3d 932
(9th Cir. 2004)..... 7

Kossov v. INS, 132 F.3d 405
(7th Cir. 1998) 7

Kuhai v. INS, 199 F.3d 909
(7th Cir. 1999) 7

Andriasian v. INS, 180 F.3d 1033
(9th Cir. 1999) 7, 8, 9

Statutes

INA §241(b) [8 USC§1231(b)(2)]..... 3, 5, 6, 7, 9

Other Authorities

8 CFR § §1240.10(f) 5, 9
8 CFR §1208.16(b).....4

PETITION FOR A WRIT OF CERTIORARI

Swee Foon Chong ("petitioner") prays that this Court reviews on certiorari the decision and Order of the United States Court of Appeals, Second Circuit, ("Court of Appeals") dismissing the Petition for Review of the judgment of the Board of Immigration Appeals ("Board") affirming the decision of the Immigration Court (IC), and the Petition for Rehearing.

DECISION BELOW

The Summary Order of the Court of Appeals dismissing the Petition for Review is set forth in the Appendix at 1a to 4a, and its Order denying the Petition for Rehearing at Appendix 5a to 6a.

JURISDICTION

The Court of Appeals Summary Order dismissing the Petition for Review was entered on August 27, 2010; and the Order denying the Petition for Rehearing on October 20, 2010. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

Pursuant to this Court's Rule 14.1(f), the pertinent provisions of the following laws and regulations are set forth at Appendix 43a to 47a:

1. Immigration and Nationality Act (INA) and INA § 241(b)(2) [8 USC 1231(b)(2)].

2. 8 CFR (Code of Federal Regulations) §1240.10(f)

STATEMENT OF THE CASE

Petitioner entered the United States on September 22, 1998 with authorization to stay until September 21, 1999.

On February 22, 2002, petitioner, a Malaysian citizen, and her husband Vincentius FNU, an Indonesian citizen, were placed in removal proceedings. In the decision of the Immigration Judge (IJ) of Jan. 27, 2003 the applications of petitioner and her husband for asylum, withholding of removal and protection under the Convention Against Torture (CAT) were denied although they were granted Voluntary Departure.

Petitioner and her husband appealed to the Board which returned the records back to the IJ due to missing information. On remand, the IJ decided to try the case de novo and directed the petitioner and her husband to file new I-589 Applications, which they did.

In her I-589 Application, petitioner indicated her fear of persecution in Indonesia if she and her husband were forced to return there. She wanted to go to Indonesia with her husband and children because she did not want to be separated from her family.

At the de novo removal proceedings, the IJ did not designate a country of removal for petitioner and her husband before the case was heard on February 6, 2007. The hearing consisted of the lone testimony of petitioner's husband.

At the conclusion of the testimony of petitioner's husband, counsel stated: "Nothing further from the Respondent. I have nothing further on re-direct, sir."

The IJ then terminated the proceedings by stating that: "I'm going to enter a decision in your case on May 23, 2007 at 8:30 in the morning..."

On May 23, 2007 the petitioner and her husband appeared. The IJ set the case for hearing on December 5, 2007 informing them that he will prepare and issue the decisions on or before the said date. On December 5, 2007, the IJ issued a decision granting petitioner's husband's withholding of removal but denying petitioner's application for asylum and withholding of removal, to wit:

> "I find co-Respondent entered the United States on September 22, 1998... She remained here beyond that date without permission... As such, I find her removable as charged. (Ex. 3); 8 CFR § 1240.8(a). ***I designate Malaysia as the country of removal.*** See INA § 241(b)(2)(D)." (Emphasis supplied)
>
> "...I also find co-Respondent statutorily ineligible for asylum because she is not a citizen or national of Indonesia. She is also ineligible for withholding of removal under the Act and under the CAT **because she applied for relief from Indonesia, which is not her proposed country of removal."** (Emphasis supplied)
>
> "...Co-Respondent's proposed country for removal is Malaysia and not Indonesia. Therefore her application for withholding of removal under the Act is denied because she is not seeking withholding of

> removal from her proposed country of removal. See 8 CFR §1208.16(b)."
>
> "...Also, co-Respondent will not be removed to Indonesia so her applications for withholding of removal under the Act and CAT relief are also denied."

The court did not mention anything about the relief of Voluntary Departure.

The petitioner appealed to the Board the decision of the IJ ordering her removal. The Board denied the appeal in its decision dated March 16, 2005. The petitioner appealed the Board's decision to the US Court of Appeals 2nd Circuit, on a Petition for Review which the Court of Appeals denied in its Summary Order dated August 27, 2010. A Petition for Rehearing was then filed which was denied in the Order dated October 20, 2010.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided an important question of federal law in a manner that conflicts with the constitution, law and relevant decisions of this Court and the same calls for the exercise of this Court's supervisory power.—

In its Summary Order of August 27, 2010, the Court of Appeals denied petitioner's Petition for Review on the ground that "the IJ did not err in considering her application for withholding with regard to Indonesia – and in denying that application, given that her designated country of

removal was Malaysia and that she failed to point to any compelling evidence that she established her eligibility for withholding of removal to Malaysia."

As pointed out in its Petition for Rehearing, the Court of Appeals, in so holding, overlooked the fact that at the removal proceedings of the instant case before the IJ, no proposed country of removal was designated in accordance with the procedure set forth in 8 CFR 1240.10(f) and INA § 241(b)(2) [8 USC 1231(b)(2)].

8 CFR 1240.10(f) provides that "the Immigration Judge shall notify the respondent that if he or she is finally ordered removed, the country of removal will in the first instance be the country designated by the respondent . . . and shall afford him or her an opportunity then and there to make such designation."

On the other hand, under INA §241 (b)(2) which delineates the process by which the Attorney General determines the country to which an alien can be removed, the first choice, in subparagraph 241 (b)(2)(A)(i), is for the Attorney General to remove the alien to the country that the alien designates. Subparagraph (b)(2)(C) provides, however, that the Attorney General may disregard a designation under subparagraph (A)(i) if: (i) the alien fails to designate a country promptly; (ii) the government of the country does not inform the Attorney General finally, within 30 days after the date the Attorney General first inquires, whether the government will accept the alien into the country; (iii) the government of the country is not willing to accept the alien into the country; or (iv) the Attorney General decides that removing the alien to the country is prejudicial to the

United States. Only if an alien is not removed to a country designated under subparagraph (A)(i), will the Attorney General proceed to subparagraph (b)(2)(D) to remove the alien to a country of which the alien is a subject, national, or citizen, *Ali v Ashcroft,* 346 F.3d 873 (9th Cir. 2003).

Contrary to the above, what the IJ did was to designate Malaysia as the proposed country of removal of the petitioner (because she was a citizen of Malaysia) at the end of the removal proceedings i.e. in its Decision of December 5, 2007, to wit: "I designate Malaysia as the country of removal. See INA Sec. 241(b)(2)(D)." Before that, the IJ did not ask petitioner the proposed country of removal or afford her an "opportunity then and there to make such designation". Neither did the IJ make that designation because the conditions where an IJ can designate the country of nationality as the country of removal under the above statute exists.

Moreover, it was apparent that the removal proceedings were conducted on the assumption that the country of removal was Indonesia. Indeed, the petitioner and her husband indicated in their I-589 Applications for Asylum and Withholding of Removal that they feared persecution in Indonesia and the lone witness' (petitioner's husband's) testimony was on persecution from Indonesia. Even the IJ made the following remark, which is quite revealing, during the testimony of petitioner's husband:

> "Judge to Counsel: Would you be willing to waive the presence of the female Respondent? The children are here. They could perhaps be outside and be a little less constrained. And then if we

> wanted to call her, I don't know if it's necessary to call here as a witness, but if you're willing to, we could have her come in at that point."

However, came decision time, because petitioner was from Malaysia, the IJ suddenly designated Malaysia as the country of removal vis-à-vis petitioner's withholding of removal claim, and then denied the same on the ground that the evidence petitioner submitted referred to Indonesia not to Malaysia.

Under the statutorily delineated process by which the Attorney General determines the country to which an alien can be removed, the first choice is for the Attorney General to remove the alien to the country that the alien designates. *Ali v Ashcroft,* 346 F.3d 873 (9th Cir. 2003). The method by which the country for removal is designated must comply with the statutory procedure set forth in INA § 241(b)(2) otherwise the same is not valid (*El Himri vs Ashcroft,* 378 F.3d 932 (9th Cir. 2004); *Ali v Ashcroft,* 346 F.3d 873 (9th Cir. 2003)).

There are due process considerations where the potential country of removal is not specifically named and the alien is not afforded the opportunity to apply for protection as appropriate for that country (e.g. *Kossov v. INS,* 132 F.3d 405 (7th Cir. 1998); *Kuhai v. INS,* 199 F.3d 909 (7th Cir. 1999). In *Andriasian v. INS,* 180 F.3d 1033, 1041 (9th Cir. 1999) the Immigration and Nationality Service agreed that alien was entitled to remand where the potential country of removal was not designated until the end of the removal hearing.

In the final publication of the adoption of 8 CFR 1240.10(f), the Attorney General pointed out that thereby "an alien will know at the time of the removal hearing all of the potential countries of removal and may apply for protection from the country or countries as appropriate. Any protection claims will then be addressed as part of the removal hearing, which itself provides the process that is due (Fed. Register, Jan. 5, 2005, Vol. 70, No. 3, pp. 661-675).

In one case, the Court of Appeals in a footnote observed that:

> "'Under 8 U.S.C. § 1253(a), an alien has a right to designate a country of deportation. We have characterized this right as a substantive right and have found that failure to afford an alien this right constitutes reversible error.' Bui v. INS, 76 F.3d 268, 270 (9th Cir.1996). Although the INS would have been free to disregard this designation if Australia were to refuse to accept Mr. Andriasian or to fail to respond to the INS inquiry within the time period prescribed by law, it lacked the authority to simply ignore Mr. Andriasian's choice." *Andriasian v. INS*, 180 F.3d 1033, (9th Cir. 1999).

The IJ by designating Malaysia in its Decision as the country of removal deprived the petitioner of the opportunity to present evidence of withholding in that regard. Failing to notify individuals who are subject to deportation that they have the right to apply for asylum in the United States and for withholding of deportation to the country to which

they will be deported violates both INS regulations and the constitutional right to due process. *Andriasian v. INS*, 180 F.3d 1033, (9th Cir. 1999) citing Kossov v. INS, 132 F.3d 405, 408-09 (7th Cir.1998). By sustaining the decision of the Board which sustained the decision of the IJ, the Court of Appeals decided the case in a manner that directly conflicts with the constitution, law and established jurisprudence.

It appears that there was confusion on the country of removal with respect to the asylum application and the withholding application of the petitioner. But there is clearly a distinction between asylum where an alien may apply for asylum if he or she has been persecuted, or has a well founded fear of persecution, from his or her country of nationality or the country where he or she last habitually resided, and withholding of removal where an alien may apply for withholding of removal to prevent removal only to a specific country or countries. 8 CFR 1240.10(f) and INA § 241(b)(2) [8 USC 1231(b)(2)] provides the mechanism by which the proposed country of removal in withholding of removal is determined.

In its Order of October 20, 2010 the Court of Appeals denied petitioner's Petition for Rehearing on the ground that the matter of designation was never raised in petitioner's brief. Yet it is clear that the appeal (i.e., the denial of petitioner's withholding of removal claim) arose out of the erroneous designation of the country of removal and resolving the issue raised by petitioner in her brief would necessarily include reviewing the proceedings before the IJ that was clearly tainted with infirmity. Thus

the Court of Appeals in affirming the denial of petitioner's withholding of removal ended up in the anomalous situation of sustaining the IJ's erroneous designation of the country of removal in violation of her due process rights. Under these circumstances, and in accordance with the United Nations Convention and Protocol relating to the Status of Refugees to afford a generous standard for protection in cases of doubt, the Court of Appeals should have granted petitioner's Petition for Review and granted the relief of withholding of removal.

The writ should thus be granted in order to correct the erroneous ruling of the 2nd Circuit US Court of Appeals and to prevent a miscarriage of justice.

CONCLUSION

WHEREFORE, it is respectfully prayed of the Honorable Court to grant the petition for a writ of certiorari.

Respectfully Submitted:

"*S/*"
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 27th day of August, two thousand ten.

PRESENT:

DENNIS JACOBS, *Chief Judge*,
JON O NEWMAN,
DENNY CHIN, *Circuit Judges*.

SWEE FOON CHONG,
Petitioner,

v. 09-3951-ag
NAC

ERICH H. HOLDER Jr., United States Attorney General,
Respondent,

FOR PETITIONER: Scott E. Bratton, Margeret Wong & Associates Co., LPA Cleveland, Ohio

FOR RESPONDENT: Tony West, Assistant Attorney General; Ernesto H. Molina, Jr., Assistant Director; Gladys M. Steffens Guzman, Trial Atty.; Office of Immigration Litigation, US Department of Justice, Washington, D.C.

UPON DUE CONSIDERATION of this petition for review of a Board of Immigration Appeals (BIA) decision, it is hereby ORDERED, ADJUDGED, AND DECREED, that the petitionfor review is DENIED.

Swee Foon Chong, a native and citizen of Malaysia , seeks review of an August 28, 2009 order of the BIA, affirming the December 5, 2007 decition of Immigration Judge ("IJ") Douglas Schoppert, which denied her application for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). *In re Swee Foon Chong*, No. A095 362 700 (B.I.A. Aug. 28, 2009, *aff'g* No. A095 362 700 (Immig. Ct., N.Y. City Dec. 5, 2007). We assume the parties' familiarity with the underlying facts and procedural history in this case.

Under the circumstances of this case, we review the decision of the IJ as supplemented by the BIA. *See Yan Chen v. Gonzales*, 417 F. 3d 268, 271 (2d Cir. 2005). The applicable standards of review are well-established. See *Salimatou Bah v. Mukasey*, 529 F. 3d 99, 110 (2d Cir. 2008); *Manzur v. U.S. Dep't of Homeland Sec.*, 494 F.3d 281, 288-89 (2d Cir. 2007).

Chong expressly declines to challenge the agency's denial of her applications for asylum and CAT relief. With respect to withholding of removal, the agency's denial was not in error. Chong asserts that she was deprived a full and fair hearing because the IJ deprived her of the opportunity to testify. "To establish a violation of due process, an alien must show that she was denied a full and fair opportunity to present her claims or that the IJ or BIA otherwise deprived her of fundamental fairnesss." *Burger v. Gonzales*, 498 F.3d 131,134 (2d Cir. 2007) (internal quotations marks omitted). Here, the record reflects that the IJ asked Chong's counsel on multiple

occasions whether he wished to present anything further for consideration before closing the record, and Chong's counsel declined to do so. Accordingly, Chong's argument that the case should be remanded to allow her an opportunity to testify is without merit. *See Hoodho v. Holder*, 558 F.3d 184, 192 (2d Cir. 2009) ("[A] party who voluntarily chose an attorney as his representative in an action cannot avoid the consequences of the acts or omissions of this freely selected agent." (internal quotation marks, alterations, and elipses omitted).

Chong also argues that the agency erred in construing her withholding of removal claim with respect to Indonesia, rather than Malaysia. As the BIA reasonably found, Chong's application for relief refers exclusively to her fear of persecution in Indonesia, her husband's country of origin , and she never expressed to the IJ her intention to seek withholding of removal to Malaysia. Accordingly, the IJ did not err in considering her application for withholding with regard to Indonesia – and in denying that application, given that her designated country of removal was Malaysia. See 8 C.F.R. §1208.16(b) (mandating that the "burden of proof is on the applicant for withholding of removal ... to establish that his or her life or freedom would be threatened in the proposed country of removal" (emphasis added); *see also Wangchuck v. Dep't of Homeland Sec.*, 448 F.3d 524,530 (2d Cir. 2006). Although Chong asserts that the evidence compels the conclusion that she established her eligibility for withholding of removal to Malaysia, she fails to point to any such compelling evidence.

For the foregoin reasons, the petition for review is DENIED. As we have completed our review, any stay

of removal that the Court previously granted in this petition is VACATED, and any pending motion for a stay of remova in this petiion is DISMISSED as moot. Any pending request for oral argument in this petition is DENIED in accordance with Federal Rule of Appellate Procedure 34(a)(2), and thSecond Circuit Local rule 34.1(b).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals
For The
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of October, two thousand ten,

PRESENT:

DENNIS JACOBS, *Chief Judge*,
JON O NEWMAN,
DENNY CHIN, *Circuit Judges*.

SWEE FOON CHONG,
Petitioner,

v.

ORDER
09-3951-ag

ERICH H. HOLDER Jr., United States Attorney General,
Respondent,

Petitioner Swee Foon Chong having filed a petition for rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED. The claims presented in the petition for rehearing – that Malaysia was improperly designated as the country for removal and that the petitioner was not accorded voluntary departure as originally

ordered by the Immigration Judge – were not included in petitioner's brief to this court. In any event, the petitioner is indisputably a citizen of Malaysia, and the original order for voluntary departure was valid only until March 31, 2003.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

Decision of the Board of Immigration Appeals
U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Date: Aug 28, 2009

File: A095 362 700 – New York, NY

In re: SWEE FOON CHONG

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gregory Kuntashian, Esquire

CHARGE:
Notice: Sec. 237(a)(1)(B), I&N Act [8USC §1227 (a)(1)(B)] – In the United States in violation of law

APPLICATION: Asylum; withholding of removal; Convention Against Torture.

This matter was last before the Board on March 16, 2005. At that time, we remanded the case involving the respondent, a native and citizen of Malaysia, and her husband, Fnu Vincentius (A095-362-699), a native and citizen of Indonesia, to the Immigration Court so that a complete transcript of the proceedings and a decision of the Immigration

Judge could be incorporated into the record.[1] On December 5, 2007, following our remand order, an Immigration Judge found the respondent's husband (the lead respondent hitherto) statutorily ineligible for asylum based on his untimely application but granted him withholding of removal from Indonesia (IJ at 13-18). No appeal of the Immigration Judge's decision relating to the lead respondent was filed. In the same decision, however, the Immigration Judge denied the respondent all forms of relief requested. We will dismiss the respondent's appeal of the Immigration Judge's decision.

On appeal, the respondent contests the Immigration Judge's denial of withholding of removal claim from Malaysia and that he effectively prevented her from testifying in the below proceedings (Respondent's Br. At 6-12). We disagree with the respondent on both accounts.

We decline to address the issue of credibility as we find that the respondent, even if deemed credible, failed to establish eligibility for relief. First, although the respondent states that she was not given "a chance to make clear the parameters of her claim for relief," including an opportunity to describe what "she may have suffered in the past, or [what] she will suffer if forced to return to Malaysia in the future"

---

[1]Following the respondents' appeal of an Immigration Judge's January 27, 2003, decision- which denied their applications for asylum and withholding of removal under sections 208(a) and 241(b)(3) of the Immigration and Nationality Act, 8 USC §§1158(a) and 1231(b)(3), respectively, and their request for protection under the Convention Against Torture – we determined that a remand was warranted given that the record was missing necessary information (IJ at 2; Tr. At 9).

(Respondent's Br. At 7, 4), she has not shown that such failure was a result of not being given a sufficient opportunity to do so by the Immigration Judge. In particular, the record reflects that the respondent, who was represented by counsel throughout these proceedings, was afforded multiple opportunities to present any form of evidence toward her applications for relief (Tr. at 1-3, 5-7, 9-23). Most significantly, the Immigration Judge specifically allowed for the possibility of allowing the respondent to testify in this matter (Tr. at 23).

While the respondent insinuates that the Immigration Judge suddenly closed the evidentiary hearing at the conclusion of the lead respondent's testimony such that the respondent's opportunity to testify was made unavailable (Respondent's Br. At 11), we reject her contention in this regard. Specifically, the transcript reveals that the Immigration Judge (1) indicated that he was intending to enter a decision in the case in an upcoming hearing on May 23, 2007, to which the respondent's counsel agree, and (2) asked if there was "[a]nything else before we close today?" to both parties, and that the respondent's counsel used this opportunity only to remind the Immigration Judge that he had earlier provided background information on Malaysia (Tr. at 50-652). At the following hearing, the Immigration Judge consulted with both parties in selecting December 5, 2007, for the date to issue a written decision and the respondent's counsel again failed to mention any desire to provide testimony from either respondent despite having an opportunity to do so (Tr. at 53-56). Moreover, although the respondent was allegedly "eager to testify on her own behalf" (Respondent's Br. At 11), she still has not

submitted any proffer of additional evidence, testimonial or otherwise, that she intended to provide. As such, the respondent has not demonstrated any error in the Immigration Judge's handling of her case. See, e.g., 8 C.F.R. §1240.1 (c) (acknowledging that an Immigration Judge is given broad authority to regulate the course of a hearing, including authority to "receive and consider material and relevant evidence").

We are also not persuaded by the respondent's argument that the Immigration Judge erred in considering her claim of withholding of removal from Indonesia, rather than Malaysia (Respondent's Br. At 6-9). Most importantly, the respondent fails to recognize that in submitting her updated asylum application on July 29, 2005, in the remanded proceedings, she only discusses her fear of going to Indonesia with her husband due to their Chinese and Christian background and fails to express any fear of returning to Malaysia (Exh. 2). Indeed, the respondent did not express any inclination to seek withholding of removal from Malaysia in any communication to the Immigration Judge and she has not shown how his reliance on her asylum application was inaccurate or unjustified (I.J at 13, 18).

With respect to the merits of her withholding of removal claim from Malaysia, the respondent has failed to come forth with individualized and probative evidence establishing a more likely than not probability of facing persecution should she be removed to Malaysia. See 8 C.F.R. §1003.1(d)(3)(ii) (stating that the Board may review question of law de novo). In this regard, we note that the respondent's updated asylum application did not indicate that she

suffered past persecution in Malaysia or that she possesses a well-founded fear of future persecution should she return there (IJ at 2, 18; Exh. 2). The respondent's vague reference to country conditions in Malaysia is also unavailing as her generalized conclusion – including unsupported contentions that she could live in Malaysia only if she converts to Islam but her husband "could not live (there) under any circumstances" (Respondent's Br. At 6-8, 10-11) – do not satisfy the burden of coming forward with specific, material, and convincing evidence. Further, despite the respondent's reliance on the Immigration Judge's statement regarding the security concerns of living in Malaysia, the Immigration Judge was summarizing the respondent's testimony, as specified in his written decision, rather than providing his own factual findings (I.J. at 7-10; Respondent's Br. At 7, 10). Therefore, we find that her fears are too speculative to give rise to a clear probability of suffering persecution in Malaysia.

Although the respondent raises arguments relating to preserving family unity, particularly in light of her two United States citizen children that she has with the lead respondent (Respondent's Br. At 11), she has failed to show that the Immigration Judge erred in this regard. Indeed, neither the Act nor the regulations provide for withholding of removal eligibility on a derivative basis. *See Huang v. INS* 436 F.3d 89, 100-101 (2d Cir. 2006); see also *Matter of A-K-*, 24 I&N Dec. 275, 279 (BIA 2007) (noting that "the Act does not permit derivative withholding of removal under any circumstances" and rejecting the Immigration Judge's grant of withholding of removal on "humanitarian grounds" as

there is no basis for such discretionary determinations).

In sum, we find that the Immigration Judge's denial of withholding of removal is correct as the respondent failed to establish eligibility for relief. See Matter of R-S-H, 23 I&N Dec. 629 (BIA 2003). In addition, the respondent failed to demonstrate eligibility under the Convention Against Torture (IJ at 18). See Matter of G-A- 23 I&N Dec. 366 (BIA 2002). Consequently, notwithstanding any evidence regarding the respondent's family in the United States or their ethnic or religious background, she has not met her burden of proof for any form of relief. Thus, as the respondent raises no argument on appeal which were not addressed by the Immigration Judge or which would cause us to reverse the Immigration Judge's decision, we find no grounds upon which to disturb the Immigration Judge's order. Accordingly, the respondent's appeal will be dismissed.

ORDER: The respondent's appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
26 FEDERAL PLAZA
NEW YORK, NEW YORK

In the Matters of	:	
	:	
FNU, Vincentius	:	
A95-362-699	:	**In Removal Proceedings**
	:	
CHONG, Swee Foon	:	
A95-362-700	:	
Respondent.	:	
_____	:	

CHARGE:
INA §237(a)(1)(B) Nonimmigrant status violators

APPLICATIONS:

INA §208	Asylum
INA §241(b)(3)	Withholding of Removal
8 C.F.R. §1208.16(c)	Convention Against Torture
INA §240 B	Voluntary Departure

ON BEHALF OF THE RESPONDENT:
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ON BEHALF OF THE DEPARTMENT
Barbara Cigarroa, Esq.
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DECISION AND ORDER OF THE IMMIGRATION JUDGE

1. Procedural history

Vincentius Fnu ("Respondent") is a native and citizen of Indonesia. [Respondent Ex. 1.] On October 22, 1998, he was admitted to the United states at New York, New York, as a B-2 nonimmigrant visitor with authorization to remain in the United States for a temporary period not to exceed April 21, 1999. [Respondent Ex. 1.] He remained in the United States beyond April 21, 1999, without permission from U.S. immigration authorities. [Respondent Ex. 1.] Swee Foon Chong ("co-Respondent") is a native and citizen of Malaysia. [co-Respondent Ex. 2.] On September 22, 1998, she was admitted to the United States at New York, New York, as a B-2 nonimmigrant visitor with authorization to remain in the United States for a temporary period not to exceed September 21, 1999. [co-Respondent Ex. 1.] She remained in the United States beyond September 21, 1999, without permission from US immigration authorities. [Respondent Ex. 1.]

On November 16, 2001, Respondent filed a Form I-589: Application for Asylum and for Withholding of Removal naming co-Respondent as a derivative on his application. [Respondent Ex. 2.] Respondent requests relief in the form of asylum pursuant to INA § 208, Withholding of removal pursuant to INA §241(b)(3), withholding of removal under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture" or "CAT") and in the alternative voluntary departure pursuant to INA §240B. [Respondent Ex. 2.] On February 28,

2002, the Immigration and naturalization Service, now the Department of Homeland Security ("DHS" or "Department"), served on each of the Respondents a Notice to Appear ("NTA"), charging them with removability pursuant to section 237(a)(1)(B) of the Immigration and Nationality Act ("INA" or "Act"), in that after admission as non-immigrants, they overstayed their visas. [Respondents Exs. 1.] In an order dated January 27, 2003, Immigration Judge ("IJ") Mills denied the Respondents' applications for asylum and withholding of removal under the Act and CAT but granted voluntary departure. [Ex. 3].

On July 29, 2005, co-Respondent filed a Form I-589: Application for Asylum and for Withholding of Removal naming Respondent as a derivative on her application. [co-Respondent Ex. 2.] Co-Respondent requests relief in the form of asylum pursuant to INA § 208, withholding of removal pursuant to INA §241(b)(3), and in the alternative voluntary departure pursuant to INA §240B. [co-Respondent Ex. 2.]

On August 9, 2006, Respondents appealed IJ Mills's decision to the Board of Immigration Appeals ("BIA" or "Board"). In a decision dated march 16, 205, the BIA held that the inadequate record of proceedings required remand and reconsideration of the applications for relief. [Ex. 4.]

On February 6, 2007, Respondent testified in support of his applications for relief.

II. Exhibits

The following documents were marked as exhibits and included in the record of the proceedings:

Respondent
Exhibit 1: Notice to Appear, served Feb. 28, 2002.

Exhibit 2: Form I-589: Application for Asylum and for Withholding of Removal, filed November 16, 2001.
Exhibit 2A: Respondent's personal statement addendum to Form I-589, November 8, 2001.
Exhibit 3: Order granting the Respondents voluntary departure, dated January 27, 2003.
Exhibit 4: Decision of the BIA remanding proceedings, dated march 16, 2005.
Exhibit 5: Updated Form I-589: Application for Asylum and Withholding of Removal, filed July 29, 2005.
Exhibit 5A: Respondent's personal statement addendum to his Form I-589, filed July 29, 2005.
Exhibit 6: Background materials, submitted July 29, 2005. (websites omitted)

- Compass Direct, Church Struggles to find Worship Facilities. January 11, 2005,
- Time Line: Persecution of Christians in Indonesia: January 2004 through June 2005.
- Persecution.org Indonesians Appeal for Indonesians Jailed for "Converting" Muslim Children.
- Persecution.org. Hunt for Sulawesi Bomber Stepped Up.
- Mathia Hariyadi, Violence in Jakarta, Ambon and Sulawesi, same terror plan, says Poso Police.
- Mathia Hariyadi, Indonesia-wide terrorist plan found in the wake of anti-Christian attack by Mamasa.
- Kurniawan Hari, Discriminatory rules still haunt Chinese-Indonesians.
- Muninggar Sri Sraswati, AGO slammed for its view on May 1998 riots.

Exhibit 7: Letter in support of Respondents from Pastor Peter Scazzero, dated July 25, 2005.
Exhibit 8: Cover letter from Gregory Kuntashian, respondents' attorney, received December 13, 2005: Background material; (websites omitted)

- Persecution.org, Government Officials Behind 2001 Inter-Faith Clashes in Poso, Dec. 5, 2005
- Persecution.org. Mob Terrorizes Indonesian Sunday School
- Persecution.org, Christian Couple Shot in Indonesia, November 21, 2005
- Persecution.org, "We Will Murder 100 More Christian Teenagers and Present You their heads as Presents", November 17, 2005
- Persecution.org, Three Christians to Be Executed Shortly, Novembr 13, 2005
- Persecution.org, High School Girl Beheading Suspects Released. Army Holds them, Keeps Police from Them til Holding Period Over, November 16, 2005
- Persecution.org, Churches find Temporary Home After Closures
- Persecution.org, Schoolgirl Dies After Being Shot in Indonesia
- Persecution.org,Ridwan Max Sijabat, Restrictions on Religious Fredom Still rampant in Indonesia, The Jakarta Post.
- Persecution.org, Indonesian Churches Complain Islamic Militants Close Churches
- Persecution.org, Two girls Shot in Same Town Where Three Girsl were beheaded.

Exhibit 9: cover sheet from the Respondents' attorney, Greg Kuntashian, rec'vd January 30, 2006;

Tab 1: Birth certificate of the Respondent's son Christopher , born Aug. 7, 1996;
Tab 2: Letter on behlf of the respondents from Victoria Kolsh, dated Jan. 26, 2006;
Tab 3: Additional Background Material:

- International Christian Concern Newsletter Vol. XII, Issue I, Jan. 2006;
- Persecution.org,Police Rivalry Contributing to Volatility on Sulawesi, Ja. 2, 2006
- US Dept. of State, International Religious Freedom Report 2005: Indonesia
- Indonesian Christians Leader Issue Joint Christmas Message (website omitted)
- Gov't Officials Behind 2001 Inter-Faith Clashes in Poso, Dec. 5, 2005
- Business Week Online, Wages of Hatred: Indonesia's Hostility to a Minority Costs the Country Dearly, October 9, 2000;

Exhibit 10: government document submissions, submitted February 3, 2006;

- US Dept. of State, Indonesia: Country Reports on Human Rights Practices (2004);
- US Dept. of State, Indonesia: International Religious Fredom Report (2005).

Group Exhibit 11
Tab 1: Respondent's birth cert. born Jan. 29, 1971;
Tab 2: co-Respondent's birth cert., born Feb. 1, 1972;
Tab 3: Respondent's baptism cert dated Feb. 14, 1971;
Tab 4: co-Respondent's bapt cert dated April 20, 1990;
Tab 5: Respondent's marriage cert. dated Nov. 8, 2001;
Tab 6: co-Respondent's mother's birth certificate , born Dec. 31, 1947;

Tab 7: co-Respondent's father's birth certificate, born Aug. 30, 1939;
Tab 8: Respondent's father's birth certificate, born Sept. 7, 1940
Tab 9: Respondent's mother's birth certificate, born July 26, 1951;
Tab 10: Respondent's father's renunciation of Chinese citizenship certificate, dated March 23, 1961;
Tab 11: Respondent's father's name change certificate, dated Feb. 4, 1967;
Tab 12: Respondent's son's motorcycle incident police report, Surabaya, Indonesia, May 23, 1999;
Tab 13: Certificate of Respondent's membership in Indonesia Pentecostal Church, dated Jan. 1, 2003;
Tab 14: Letter from Pastor Yoseph Sigit, Indonesia Pentecostal Church, personal testimony regarding status of churches in Indonesia, dated Jan. 1, 2003;
Tab 15: Notification letter re Respondent's son's membership in Sunday School in Indonesia dated Jan. 13, 2006;
Tab 16: Letter from Victoria Kolsch, Jan. 26, 2006;
Tab 17: Letter from Pastor Peter Scazzero, dated July 25, 2005;
Tab 18: Letter regarding Respondents' participation in new Life Fellowship Church from Jusup Sianturi and Jim Owens dated Jan. 15, 2003;
Tab 19: Respondent's son's birth certificate, born August 7, 1996;
Tab 20: Respondents' daughter's birth certificate, born June 9, 2004;
Tab 21: Statement of Respondent's mother Jan. 13, 2003;
Tab 22: Letter from Respondent's uncle regarding motorcycle incident dated Jan. 20, 2006;
Tab 23: Letter from Patrick Dolan June 15, 2002

Tab 24: Letter from respondent's counsel to the Consul General of Indonesia requesting document translation, Jan. 17, 2003;
Tab 25: Additional Background Materials:
Exhibit 12: US Dept. of State, US Dept. of State, Indonesia: Country Reports on Human Rights Practices (2005);
Exhibit 13: US Dept. of State, Indonesia: International Religious Freedom Report (2006).
Exhibit 14: Additional Background:

Co-Respondent
Exhibit 1: Notice to Appear, served Feb 28, 2002
Exhibit 2: Form I-589: Application for Asylum and for Withholding of Removal, filed July 29, 2005
Exhibit 3: Order granting the Respondents voluntary departure, dated January 27, 2003.
Exhibit 4: Decision of the BIA remanding proceedings, dated March 16, 2005.

III. Testimony

On February 6, 2007, Respondent appeared before the Court and testified as follows:
Respondent was born in Kediri, East Java, Indonesia on January 29, 1971. His Chinese name was listed on his baptismal certificate; however, his Indonesian name is on his birth certificate and other official documents. The Indonesian government does not allow Chinese names to be included on birth certificates. He graduated high school in Kediri in 1991, when he was twenty years old.

The Respondent's parents are ethnic Chinese; however, they were born in Indonesia. His father's parents were born in China and his mother's parents were born in Indonesia. The Respondent's father

officially adopted Indonesian citizenship by denouncing his Chinese name and citizenship. His parents still live in Indonesia.

Respondent believes in God and is a practicing Catholic. He was baptized on February 14, 1971, at Saint Joseph Church in Kediri, Indonesia. Every Sunday, he and his family attend the New Life Fellowship Church in Elmhurst, New York. There are services from nine o'clock to eleven o'clock in the morning and eleven o'clock in the morning to one o'clock in the afternoon every Sunday. He leaves his children at Sunday School and then enters the service with his wife, where they sing with the congregation and listen to sermons.

Respondent suffered in Indonesia because he is a Christian. Christians do not have freedom to attend church in Indonesia. They are taunted and beaten. Riots are sparked in reaction to their religious worship.

Respondent suffered in Indonesia because he is Chinese. Chinese are a minority in Indonesia and are treated unjustly by the government. If sent back to Indonesia, Respondent fears he will be killed or tortured and that his wife might be raped. He believes Islamic extremist groups target Christians and the ethnic Chinese. By 2003, more than 10,000 Christian churches were destroyed by Islamic extremist groups. On December 24, 2000, on Christmas Eve, there was a bombing where seven people died and seventy-two others were inured. In 2005, Muslims closed hundreds of churches. On March 27, 2006, during a mass service in a church in West Java, approximately 200 to 300 Muslims attacked the church. They tried to stop the service and close the church. The police came. There was a

meeting between pastors and Muslim leaders. In the end, the pastor agreed to stop the service and evacuate the building. Respondent feels his life will be in danger if he attends church in Indonesia because of these incidents.

He would also be targeted in Indonesia because he is Chinese. Chinese women are raped and tortured. Chinese people were targeted in the May 1998 riot in Indonesia. Approximately 10,000 Chinese died and approximately 500 Chinese women were raped by Muslims. Respondent and his wife are in danger if returned to Indonesia because they are Chinese. The situation for Chinese improved for a short period of time, but their situation has deteriorated again.

On May 23, 1999, Respondent's uncle took Respondent's son for a motorcycle ride. Four people stopped them and put a knife to Respondent's son's throat. Then they took his uncle's motorcycle and wallet. They were not injured. Respondent's uncle filed a police report. His uncle obtained the police report because he needed proof of the incident for insurance purposes. Respondent believes the perpetrators were Indonesian. He also believes that because Indonesians victimize Chinese people on a daily basis, they are targeting the Chinese. Respondent was living in the United States when his uncle and son were robbed. The Respondent's son's name is Christopher; he is eleven years old. The Respondent's mother is taking care of his son in Indonesia.

A year earlier, in August 1998, Respondent was robbed while riding a motorcycle on his way to the store. He was cut with a knife on his left arm while trying to defend himself. He did not report the incident to the police because it is not easy to get a

police report. The report has to be paid for and the police give you the "run around".

The Respondent's mother told him that in November, when there was a Muslim celebration, Muslims approached her and asked her to donate money to purchase 4,000 boxes of food or rice. His mother gave a donation to secure her well-being. The Respondent's mother rarely goes to church because of the bomb threats. The American Embassy warned Americans and other not to go to church because of the threats from Muslim extremist groups.

The main purpose of the Muslims is to get rid of al Christians; that is the reason the Respondent's parents are in danger. The extremists made a promise that by the year 2010 they will have eliminated all Christians in Indonesia. The Indonesian government is unable to control the extremists out of ear of those groups. The Indonesian Constitution provides for religious freedom, but Indonesia's law is mixed up with the Islamic religion. Christians are regulated. To have mass, at least ninety attendees have to possess an ID card, at least sixty signatures have to be obtained, and the church must get a permit from a local office.

Respondent testified that Indonesians and Muslims will know he is Christian because his facial features differ from ethnic Indonesian features. Also, his skin color is different and is easily recognized. He testified that ninety-five percent of ethnic Chinese in Indonesia are Christians so, indirectly, they would know that he is a Christian because of his ethnic Chinese appearance.

Respondent was in Indonesia at the time of the May 1998 riots. He felt his life was threatened during that time. He decided to come to the United States to

save his life. On October 22, 1998, Respondent arrived in the U.S. he applied for asylum on November 8, 2001, more than three years after his arrival, because he came with his first wife and his in-law. In 1999, his in-law applied for asylum and included the Respondent's wife on the application. His first wife's application for asylum was denied, and she ran away. Respondent divorced his wife in 2000 because she was having an affair. In 2001, he applied for asylum.

Respondent was never arrested in Indonesia. When he was younger, he was taunted and hit because he was not Indonesian and told he did not deserve to live in Indonesia. He could not defend himself because he was outnumbered. When Respondent was eighteen years old, his girlfriend was groped by a group of people. He tried to protect her, but the group "ganged up" on him. Security guards who were walking by at the time, rescued him.

Respondent was married for the first time in 1994. He divorced in 2000 and remarried in 2001. The Respondent's current wife is also Chinese, but she is a citizen of Malaysia. She previously worked in Indonesia. Respondent and his wife never went to the Malaysian consulate to determine whether they could live in Malaysia. Malaysia is a Muslim country; if Respondent and co-Respondent were Muslim, they could live in Malaysia. They checked the Malaysian consulate website and determined it would be too difficult for them to move there. Respondent never went to the consulate to verify that information. He never applied for status in Malaysia.

Respondent reiterated that there is no justice for Christians in Indonesia. Violence against Christians and ethnic Chinese in Indonesia occurs and the

Indonesian government cannot control it. He believes the Indonesian government has instructed the public to protect Christians, but it is not enforce because the government fears Muslim extremists. He has learned about the events in Indonesia from the internet.

IV. Legal Standard

A. Asylum

In an asylum adjudication, the applicant bears the burden of establishing statutory eligibility, which requires a showing of past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA §101(a)(42)(A). If eligibility is established, asylum may be granted in the exercise of discretion. INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987); Abankwah v. INS, 185 F.3d 18, 22 (2d Cir. 1999).

1. One Year Filing Deadline

If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien has the burden of proving by a preponderance of the evidence that such grounds do not apply. 8 C.F.R. §1240.8(d); see also Matter of R-S-H, 23 I&N Dec. 629, 640 (BIA 2003). An applicant must prove by clear and convincing evidence that his asylum application was filed within one year of the date of his last arrival into the United States or April 1, 1997, whichever is later. INA §208(a)(2)(B); 8 C.F.R. §1208.4(a)(2). To qualify for an exception to the filing deadline, the applicant must demonstrate the existence of either 1)changed circumstances that materially affect his eligibility for asylum, or 2) extraordinary circumstances relating to

the delay in filing an application within the filing time period. INA §208(a)(2)(D); 8 C.F.R. §1208.4 (a)(4)-(5). In either instance, the applicant must apply within a reasonable period given the changed or extraordinary circumstances. 8 C.F.R. §1208.4 (a)(4)-(5).

"Changed circumstances" include, but are not limited to, 1)changes in the applicant's country of nationality or, if the applicant is stateless, country of last habitual residence; 2) changes in the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place an applicant at risk; or 3) the termination of a relationship that qualified an applicant as a dependent on another's pending asylum application, including attainment of age twenty-one by the dependent. 8 C.F.R. §1208.4 (a)(4)(A)-(C).

B. Withholding of Removal under INA §241(b)(3)

As with asylum, a threshold determination must be made as to the credibility of the applicant for withholding of removal. INA §241(b)(3)(C); see also INA §208(b)(1)(B)(ii) and (iii). A claim for withholding of removal is factually related to an asylum claim, but the applicant bears a heavier burden of proof to merit relief. For withholding, the applicant must demonstrate that, if returned to his country, his life or freedom would be threatened on account of one of the protected grounds. INA §241(b)(3); see also Zhang v. INS, 386 F.3d 66, 71 (2d Cir. 2004). To make this showing, the applicant must establish a "clear probability" of persecution, meaning that it is "more likely than not" that he will be subject to persecution

on account of a protected ground if returned to the country from which he seeks withholding of removal Cardoza-Fonseca, 480 U.S. at 421. The applicant's credible testimony alone may be sufficient to sustain this burden of proof. 8 C.F.R. 208.16(b). If an alien demonstrates that s/he suffered past persecution in the proposed country of removal, the burden shifts to the Department to demonstrate that a fundamental change in circumstances has occurred in that country or that the applicant could safely relocate to another area in the proposed country of removal. 8 C.F.R. §208.16 (b)(1); Makadji v. Gonzales, 470 F. 3d 450, 455 (2d Cir. 2006). There is no discretionary element. Therefore, if the applicant establishes eligibility, withholding of removal must be granted. INA §241(b)(3); see also INS v. Ventura, 537 U.S. 12, 13 (2002). Additionally, there is no statutory time limit for bringing a withholding of removal claim.

Because asylum and withholding claims rely on the same factual basis, but there is a heavier burden for withholding, "an applicant who fails to establish his eligibility for asylum necessarily fails to establish eligibility for withholding." Zhang, 386 F.3d at 71; see also Ramsameachire v. Ashcroft, 357 F.3d 169, 178 (2d Cir. 2004); Ankwah, 185 F.3d at 22. However, an applicant who establishes statutory eligibility for asylum but is denied asylum in the exercise of discretion, remains eligible for withholding of removal. Osorio v. INS, 18 F.3d 1017, 1032 (2d Cir. 1994).

C. Withholding of Removal under the Convention Against Torture

The Convention Against Torture and its implementing regulations provide that no person may

be removed to a country where it is "more likely than not" that such person will be subject to torture. See United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), G.A. Res. 39/46, UN Doc. A/39/51 (Dec. 10, 1984); Pub. L. 105-277 (1998); 8 CFR 1208.16, 1208.17, 1208.18; see also Matter of M-B-A- 23 I&N dec. 474, 477-478 (BIA 2002).

"Torture" is defined, in part, as the intentional infliction of severe pain or suffering by, or at the instigation of, or with the consent or acquiescence of a public official. 8 CFR 1208.18(A)(1). For an act to constitute torture, it must be directed against a person. Jo v. Gonzales, 458 f.3d 104, 109-10 (2d Cir. 2006). The definition of "torture" does not encompass the theft or destruction of property. Id. Acquiescence of a public official requires that the official have awareness of or remain "willfully blind" to the activity constituting torture, prior to its commission, and thereafter breach his or her legal responsibility to intervene to prevent such activity. 8 CFR 1208.18(a)(7); Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d cir. 2004); see also Rafiq v. Gonzales, 468 F.3d 165, 166 (2d Cir. 2006); Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003). But cf. Matter of Y-L-, A-G, R-S-R- 23 I&N. Dec. 270, 290 A.G. 2002) (requiring an applicant to show that authorities are "willfully accepting: of torturous activities; it is not enough to show that officials are aware of such activity but are powerless to stop it) (quoting Matter of S-V-, 22 I&N Dec 1306, 1312 (BIA 2000).

The applicant for CAT relief bears the burden of proof. 8 CFR 1208.16(c)(2). As with asylum adjudications, the applicant's testimony, if credible, may be sufficient to sustain the burden of proof

without corroboration. Id., see also Matter of Y-B-, 21 I&N Dec. 1136, 1139 (BIA 1998). However, if the applicant's testimony is the primary basis for the CAT claim and it is found not to be credible, that adverse credibility finding may provide a sufficient basis for denial of CAT relief. Xiao Ji Chen v. US Dep't of Justice, 434 F.3d 144, 163 (2d Cir. 2006). In assessing whether the applicant has satisfied the burden of proof, the Court must consider all evidence relevant to the possibility of future torture, including evidence that the applicant has suffered torture in the past; evidence that the applicant could relocate to a part of the country of removal where he is not likely to be tortured; evidence of gross, flagrant or mass violations of human rights within the country of removal; and other relevant information on country conditions. 8 CFR 1208.16(c)(3). A pattern of human rights violations alone is not sufficient to show that a particular person would be in danger of being subjected to torture upon his return to that country; specific grounds must exist to indicate that the applicant will be personally at risk of torture. Matter of S-V-, 22 I&N Dec. at 1313. To meet his burden of proof, an applicant for CAT relief must establish that someone in his particular alleged circumstances is more likely than not to be tortured in the country designated for removal. Wang v. Ashcroft, 320 F.3d 130, 144 (2d Cir. 2003); Matter of J-E-, 23 I&N Dec. 291, 303-04 (BIA 2002); Matter of G-A, 23 I&N Dec. 366, 371-72 (BIA 2002); Matter of M-B-A-, 23 I&N Dec. at 478-79. Eligibility for CAT relief cannot be established by stringing together a series of suppositions to show that torture is more likely than not to occur unless the evidence shows that each step in the hypothetical chain of events is more likely

than not to happen. Matter of J-F-F- 23 I&N Dec. 912, 917-18 (A.G. 2006). There is no statutory limit for filing a claim under the Convention Against Torture.

V. Legal Analysis

I find Respondent entered the United States on October 22, 1998 with a B-2 visa that permitted him to remain in the United States for a period not to exceed April 21, 1999. [Respondent Exs. 1&2.] he remained here beyond that date without permission from the United States immigration officials. As such, I find him removable as charged. [Ex. 3.]; 8 CFR 1240.8(a). I designate Indonesia as the country of removal. See INA §241(b)(22)(D).

I find co-Respondent entered the United States on September 22, 1998 with a B-2 visa that permitted her to remain in the United States for a period not to exceed September 21, 1999. [co-Respondent Exs. 1&2.] She remained here beyond that date without permission from the United States immigration officials. As such, I find her removable as charged. [Ex. 3.]; 8 CFR 1240.8(a). I designate Malaysia as the country of removal. See INA §241(b)(22)(D).

In accordance with the BIA's March 16, 2005 decision, I have reconsidered the Respondent and co-Respondent's applications for asylum. At the Board's request, I took testimony and built a thorough record of proceedings. After reviewing this record, I do not find that Respondent filed within one-year of his most recent entry into the United States, or that he qualifies for an exception to the one-year filing requirement. Thus, I conclude that Respondent is statutorily ineligible for asylum. I find , however, Respondent eligible for withholding of removal under

the Act. I also find co-Respondent statutorily ineligible for asylum because she is not a citizen or national of Indonesia. She is also ineligible for withholding of removal under the Act and under the CAT because she applied for relief from Indonesia, which is not her proposed country of removal.

A. Respondent's Applications for Relief

1. Asylum

i. One-Year Filing Deadline

Respondent arrived in the United States on October 22, 1998. [Respondent Ex. 1; Resp't Test. Feb. 6, 2007.] More than three years later, on November 16, 2001, he filed an application for asylum. [Respondent Ex. 2.] As Respondent did not file his asylum application within the one-year filing deadline, he must show that changed circumstances or extraordinary circumstances prevented him from filing his application in a timely manner. See INA §208(a)(2)(B), (2)(D); 8 CFR 1208.4(a)(2), (a)(4)-(5). Respondent claims that changed country conditions, rather than extraordinary circumstances, excuse his delay in filing his asylum application. Specifically, Respondent alleges that the violence in Indonesia targeting both Chinese and Christians was worse when he applied for asylum than when he arrived in the United States three years earlier, and that he therefore qualifies for an exception to the one-year filing deadline. Thus, I will consider evidence that Indonesian country conditions with regard to ethnic Chinese or Christians worsened after he entered the United States in 1998.

First, Respondent claims that because he is Chinese, a minority group in Indonesia, he is subject to harassment and mistreatment by the government

and the general population of Indonesia. According to the 1998 United States Department of State Country Reports on Human rights Practices for Indonesia ("1998 Country Report"),[1] Indonesia has historically been a difficult place to live for ethnically Chinese individuals. There are documented instances of harassment and discrimination that give credence to the Respondent's reservations about living in Indonesia as an ethnic Chinese individual. See 1998 Country Report. However, racial discrimination in Indonesia has been constant and was at its worst before Respondent arrived to the United States. See 1998 Country Report. Specifically, he came to the US in October 1998, only a few months after the may 1998 riots that targeted Chinese Indonesians, and yet he did not apply for asylum at that time. See [Ex.2.] Moreover, according to the United States Department of State Country Reports on Human Rights Practices 2001 ("2001 Country Report"), Indonesia has becomes much more racially tolerant since the 1998 riots. Attacks against Chinese Indonesians dropped substantially since 1998. See 2001 country Report. While the government had prohibited and tightly regulated Chinese education and publishing, in 2001 the Chinese language could be taught, spoken, and printed. See 2001 Country Report. Private instruction in Chinese was also allowed. The government also no

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[1] The Second Circuit has held that in order to evaluate an applicant's claim in the context of the current political situation in his or her country, the relevant report from the US Department of State must be considered. Chen v. Gonzales, 417 F.3d 268 (2d Cir. 2005). As the record contains sparse information about the relevant time period, I take administrative notice of the US Department of State Country Report for Indonesia for 1998 and 2001.

longer required a special code on the national identification card for Chinese Indonesians. Harassment and discrimination were still evident in Indonesia, but Chinese Indonesians advanced with the aid of Indonesia's government. See 2001 Country Report. As such, there is no evidence that country conditions worsened for Chinese Indonesians between 1998 and 2001.

Second, I also find no evidence of worsened country conditions with regard to Christian Indonesians between 1998 and 2001 that would warrant an exception to the one-year filing deadline. According to the 1998 Country Report, clashes between Muslims and Christians led to 128 attacks on churches and other religious facilities during 1998. See 1998 Country Report. Interreligious violence broke out in West Java in February 1998. In November 1998, fourteen people were killed and twenty-seven local churches and Christian schools were attached during a riot in West Jakarta between Muslim residents and Christian security guards. Additionally, a regulation mandated that before a religious structure could be built, builders had to obtain an agreement from local residents and a license from the Ministry of Religion. Christians alleged that the regulation was meant to discriminate against them and keep them from building churches. See 1998 Country Report.

The 2001 Country Report paints a similar picture of life for Christian Indonesians. The construction of churches remained regulated. Anti-Christian sentiment continued and there were violent outbursts. From October 1999 to September 2001, 235 religiously motivated attacks occurred. Anti-Christian sermons and publications increased during

2000. However, a tenuous peace agreement was put in place by the end of 2000 between Christians and Muslim extremists, showing promise of improvement in the interreligious conflict rather than stagnation or deterioration at the time Respondent filed his asylum application. See 2001 Country Report.

In sum, the evidence demonstrates that interreligious violence in Indonesia has been an ongoing problem for more than a decade. Christians and Muslims clash and there are casualties on both sides. See 2001 country Report. It is unfortunate but ongoing. As such, respondent is not entitled to an exception to the one-year filing deadline due to changed country conditions. See 8 CFR 208.4(a)(4)(A); 1240.8(d). In the period leading up to and including 2001, interreligious conflict continued; however, it was the result of strife that already existed in 1998 when Respondent arrived in the United States. See 2001 Country Report. Therefore, I find the Respondent's application for asylum is barred by the one-year filing deadline. See 8 CFR 208.4(a)(4)(A); 1240.8(d).

B. Withholding of Removal under INA §241(b)(3)

As a preliminary matter, I find Respondent testified credibly in support of his application for relief. See Matter of O-D-, 21 I&N Dec. 1079, 1081 (BIA 1998). While he confused the years of his motorcycle robbery with that of his son, he was otherwise substantially consistent See Matter of B-, 21 I&N Dec. 66, 70-71 (BIA 1995) (finding that an alien who has fled persecution may have trouble remembering exact dates when testifying, and such failure to provide precise dates may not be an indication of deception).

His devotion to Christianity is corroborated by his baptismal certificate and letters from clergy confirming his attendance at weekly services. There is also no doubt that he is ethnically Chinese based on his parent's birth records and other documentation.

Although Respondent testified credibly, I find the mistreatment he suffered in Indonesia due to his Chinese race does not constitute past persecution. 8 CFR 208.16(b)(1). There is no doubt that life is difficult in Indonesia for ethnic Chinese individuals. Respondent testified that he was harassed by his Indonesian peers as a Chinese Christian child. His amended asylum application refers to an incident where he was beaten by a group of Indonesians because he tried to defend his girlfriend. [Respondent Ex.5A.] However, harassment and discrimination do not generally constitute persecution as contemplated by the Act. Matter of A-M- 23 I&N Dec. 737, 740 (BIA 2005). Therefore Respondent's experiences as a child do not constitute past persecution on account of race.

Respondent also testified that he and members of his family were robbed by unidentified assailants. Undoubtedly, the Respondent's experience was psychologically damaging, as was his inability to protect his son from mistreatment. However, there is no evidence that Respondent was robbed on account of one of the protected grounds. The Respondent's testimony suggests that the perpetrators were motivated by a desire to harm Respondent and extort money. Robberies occur on account of poverty and desperation. According to the US Department of State County Reports on Human rights Practices 2006 ("2006 Country Report"), Indonesia's economy

has been struggling for years.[1] Thus I find that Respondent was not targeted for robbery on account of his race but for pecuniary gain. Therefore, his claim of past persecution on account of his race falls.

I find, however, that Respondent was subject to past persecution on account of his religion. The Respondent's amended asylum application describes an incident when a group of Indonesians "converged" upon his home where he and other Christians were conducting a bible study. [Respondent Ex. 5A.] The group threatened to burn his family's car, broke down the fence surrounding his property, and threatened the worshippers. The group then painted a sign on a wall on their property saying "Kill Damn Chinese Christian!" According to Respondent he and his fellow worshipers 'dared not continue to hold our bible studies." Respondent also refers to an incident at his church during the May 1998 riots. He describes how repeated threats forced the Indonesian Pentecostal church that he attended to close down. Also, Muslims in the street checked identification cards to see what religion pedestrians were and if they were not Muslim, they would be attacked. [Respondent Ex. 5A] These incidents inhibited the Respondent's religious practice and were threats to his life and freedom. 8 CFR 1208.16(b)(1). Thus, I find Respondent suffered past persecution on account of his Christian religion. See Mirzoyan v. Gonzales,

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[1] If the most recent US State Dep't report was not submitted by either party, the Court may take administrative notice of its contents. See Yang v. McElroy, 277 F.3d 158 (2d Cir. 2002). As such, I also take administrative notice of the US Department of State Country Reports for Indonesia for 2006 and of the 2007 Annual Report of the United States Comission on International Religious Freedom.

457 F.3d 217 (2d Cir. 2006) (finding that discrimination and other mistreatment may, in extra ordinary cases, be so sever as to constitute persecution).

If past persecution is established, a presumption arises that the applicant has a well-founded fear of future persecution on the basis of his original claim. 8 CFR 1208.16(b)(1). This regulatory presumption may be rebutted if the Department establishes by a preponderance of the evidence that the applicant's fear is no longer well-founded due to a fundamental change in circumstances, or that the applicant could avoid future persecution by relocating to another part of the country, and that it would be reasonable to expect him to do so. 8 CFR 1208.16(b)(1)(i)-(ii).

I find that Respondent's presumption of future persecution has not been rebutted by the Department, the 2006 Country Report, the International Religious Freedom report for 2006 ("2006 Religious Report"), or the Annual Report of the United States Commission on International Religious Freedom ("2007 Annual Report"). Violence directed against Christians has continued in Indonesia with the government initiatives to promote religious tolerance largely failing. According to the 2007 Annual Report, religious extremists are gaining power and political influence in Indonesia. The extremists are responsible for forcibly closing religious minority places of worship. The report stresses that extremism is now on the rise among Indonesian Muslims and that there is a risk of mob violence and terrorism. Local officials are intimidated by the extremists and according to the report "[p]olice almost never act to prevent forced church, temple or

mosque closings and sometimes assistant militant groups in the closures." See 2007 Annual Report.

The 2006 Religious Report corroborates these observations. According to that report, the government tolerated discrimination against and the abuse of religious groups by private actors and often failed to punish perpetrators of those acts.. Extremist groups used intimidation and violence to close churches, much in the manner Respondent described in his testimony and his Form I-589. See 2006 Religious Report; See also [Ex.2.] the report goes on to describe how the Islamic Defenders Group and the Alliance for Anti-Apostates have closed churches backed by the local Muslim communities. Church members were threatened with violence. This report also emphasizes that police, though present at the church closings, rarely acted to prevent the threats and sometimes helped to close the churches. See 2006 Religious Report. These groups seem to act with impunity from authorities. Therefore, I find that the Indonesian government is unwilling or unable to control religious extremists who target Christians in Indonesia.

For withholding of removal, the applicant must establish a "clear probability" of future persecution, meaning that it is "more likely than not" that he will be subject to persecution on account of a protected ground if returned to the country from which he seeks withholding of removal. Cardoza-Fonseca, 480 US at 421. The applicant's credible testimony alone may be sufficient to sustain this burden of proof. 8 CFR 208.16(b). the Respondent's devotion to his Christian faith and previous encounter with Muslim extremists establishes that there is a clear probability he would be subject to persecution if

returned to Indonesia. The Respondent's statements are corroborated by the Country Reports which show that the Indonesian government is impotent in quelling the violence targeting Christians. See 2006 Country Report; Ivanishvili v. US Dep't of Justice, 433 F.3d 332, 342 (2d Cir. 2006) (finding that private acts may be persecution if the government is proven to be unwilling or unable to control the actors). Thus, I find the Respondent has demonstrated a future threat to his life or freedom and this it is more likely than not that he would be persecuted on account of his religious beliefs. 8 CFR 1208.16(b)(1).

In sum, I find Respondent has met his statutory burden for withholding of removal pursuant to 8 CFR 1208.16(b)(1). As such, I grant his application for relief in the form of withholding of removal under the Act. As I have granted this relief, it is not necessary to consider his relief under the CAT.

C. The respondent's Applications for Relief

1. Asylum

As the Second Circuit has recognized, a "petitioner's nationality, or lack of nationality, is a threshold question in determining his eligibility for asylum." Dhoumo v. BIA, 416 F.3d 172, 174 (2d Cir. 2005); see also Wangchuck v. DHS, 448 F.3d 524, 528 (2d Cir. 2006). Co-Respondent is a native and citizen of Malaysia, rather than Indonesia.[1][co-Respondent Ex. 2.] As such, co-Respondent is statutorily ineligible for asylum from Indonesia and her application must

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[1] Co-Respondent has not claimed to have suffered past persecution in Malaysia or to have a well founded fear of return to Malaysia

be denied. See INA §101(a)(42) (defining refugee as a person who is unwilling or unable to avail themselves of protection in their country of nationality).

2. Withholding of Removal

The co-Respondent's application for withholding of removal under the INA to Indonesia based on her race is without merit. Withholding of removal under section 241(b)(3) of the INA is reserved for those whose life or freedom would be threatened in the proposed country for removal on account of a protected ground See 8 CFR 1208.16(b). Co-Respondent's proposed country for removal is Malaysia and not Indonesia. Therefore, her application for withholding of removal under the Act is denied because she is not seeking withholding of removal from her proposed country of removal. See 8 CFR 1208.16(b).

Finally, co-Respondent has failed to meet the burden of proof for CAT. To meet this burden an applicant for CAT relief must establish that someone in her particular alleged circumstances is more likely than not to be tortured in the country designated for removal. Wang v. Ashcroft, 320 F.3d at 144; Matter of J-E-, 23 I&N Dec. at 303-304; Matter of G-A-, 23 I&N Dec. at 371-72; Matter of M-B-A-, 23 I&N Dec. at 478-79. I designated Malaysia s the country for removal, not Indonesia. Co-Respondent did not apply for CAT relief from Malaysia and did not submit any documentation into the record of proceedings to show she would likely be tortured if removed to Malaysia. Therefore, her application for withholding under CAT is also denied.

VI. Conclusion

I find Respondent statutorily barred from asylum because of his failure to comply with the one-year filing deadline. INA §208(a)(2)(B); 8 CFR 1208.4(a)(2). I also find Respondent eligible for withholding of removal under the Act and will therefore not address his application for relief under the CAT. Further, I find co-Respondent is statutorily barred from asylum from Indonesia because she is not a citizen or national of that country. See INA §101(a)(42). Also, co-Respondent will not be removed to Indonesia so her applications for withholding of removal under the Act and CAT relief are also denied.

Accordingly, after a careful review of the record, the following orders will be entered:

ORDER

IT IS HEREBY ORDERED that Respondent's application for asylum under §208 of the Immigration and nationality Act be **DENIED.**

IT IS FURTHER ORDERED that the Respondent's application for withholding of removal under §241(b)(3) of the Immigration and nationality Act be GRANTED.

IT IS FURTHER ORDERED that the co-Respondent's application for asylum under §208 of the Immigration and Nationality Act be **DENIED.**

IT IS FURTHER ORDERED that the co-Respondent's application for withholding of removal from Indonesia under §241(b)(3) of the Immigration and Nationality Act be **DENIED.**

IT IS FURTHER ORDERED that withholding of removal to Indonesia under Article 3 of the convention Against Torture be **DENIED.**

IT IS FURTHER ORDERED that the co-Respondent be removed to Malaysia on the charge contained in the Notice to Appear.

12-5-05
Date

Douglas Schoppert
U.S. Immigration Judge

STATUTORY PROVISIONS INVOLVED

Section 241(b) of the Immigration and Nationality Act (INA); [8 USC§1231(b)(2)].

(b) Countries to Which Aliens May Be Removed.-

(1) Aliens arriving at the United States. - Subject to paragraph (3)-

(A) In general.-Except as provided by subparagraphs (B) and (C), an alien who arrives at the United States and with respect to whom proceedings under section 240 were initiated at the time of such alien's arrival shall be removed to the country in which the alien boarded the vessel or aircraft on which the alien arrived in the United States.

(B) Travel from contiguous territory.-If the alien boarded the vessel or aircraft on which the alien arrived in the United States in a foreign territory contiguous to the United States, an island adjacent to the United States, or an island adjacent to a foreign territory contiguous to the United States, and the alien is not a native, citizen, subject, or national of, or does not reside in, the territory or island, removal shall be to the country in which the alien boarded the vessel that transport ed the alien to the territory or island.

(C) Alternative countries.-If the government of the country designated in subparagraph (A) or (B) is unwilling to accept the alien into that country's territory, removal shall be to any of the following countries, as directed by the Attorney General:

(i) The country of which the alien is a citizen, subject, or national.
(ii) The country in which the alien was born.
(iii) The country in which the alien has a residence.
(iv) A country with a government that will accept the alien into the country's territory if removal to each country described in a previous clause of this subparagraph is impracticable, inadvisable, or impossible.

(2) Other aliens.-Subject to paragraph (3)-
(A) Selection of country by alien.-Except as otherwise provided in this paragraph-
(i) any alien not described in paragraph (1) who has been ordered removed may designate one country to which the alien wants to be removed, and
(ii) the Attorney General shall remove the alien to the country the alien so designates.

(B) Limitation on designation.-An alien may designate under subparagraph (A)(i) a foreign territory contiguous to the United States, an adjacent island, or an island adjacent to a foreign territory contiguous to the United States as the place to which the alien is to be removed only if the alien is a native, citizen, subject, or national of, or has resided in, that designated territory or island.

(C) Disregarding designation.-The Attorney General may disregard a designation under subparagraph (A)(i) if-
(i) the alien fails to designate a country promptly;
(ii) the government of the country does not inform the Attorney General finally, within 30 days after the

date the Attorney General first inquires, whether the government will accept the alien into the country;
(iii) the government of the country is not willing to accept the alien into the country; or
(iv) the Attorney General decides that removing the alien to the country is prejudicial to the United States.

(D) Alternative country.-If an alien is not removed to a country designated under subparagraph (A)(i), the Attorney General shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country-
(i) does not inform the Attorney General or the alien finally, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or
(ii) is not willing to accept the alien into the country.

(E) Additional removal countries.-If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:
(i) The country from which the alien was admitted to the United States.
(ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.
(iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.
(iv) The country in which the alien was born.

(v) The country that had sovereignty over the alien's birthplace when the alien was born.
(vi) The country in which the alien's birthplace is located when the alien is ordered removed.
(vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

(F) Removal country when United States is at war.-When the United States is at war and the Attorney General decides that it is impracticable, inadvisable, inconvenient, or impossible to remove an alien under this subsection because of the war, the Attorney General may remove the alien-
(i) to the country that is host to a government in exile of the country of which the alien is a citizen or subject if the government of the host country will permit the alien's entry; or
(ii) if the recognized government of the country of which the alien is a citizen or subject is not in exile, to a country, or a political or territorial subdivision of a country, that is very near the country of which the alien is a citizen or subject, or, with the consent of the government of the country of which the alien is a citizen or subject, to another country.

(3) Restriction on removal to a country where alien's life or freedom would be threatened.-
(A) In general.-Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that

country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

PROVISIONS OF CODE OF FEDERAL (CFR) REGULATIONS INVOLVED

8 CFR § §1240.10(f)

(f) Country of removal. With respect to an arriving alien covered by section 241(b)(1) of the Act, the country, or countries in the alternative, to which the alien may be removed will be determined pursuant to section 241(b)(1) of the Act. In any other case, the immigration judge shall notify the respondent that if he or she is finally ordered removed, the country of removal will in the first instance be the country designated by the respondent, except as otherwise provided under section 241(b)(2) of the Act, and shall afford him or her an opportunity then and there to make such designation. The immigration judge shall also identify for the record a country, or countries in the alternative, to which the alien's removal may be made pursuant to section 241(b)(2) of the Act if the country of the alien's designation will not accept him or her into its territory, or fails to furnish timely notice of acceptance, or if the alien declines to designate a country. In considering alternative countries of removal, acceptance or the existence of a functioning government is not required with respect to an alternative country described in section 241(b)(1)(C)(i)(iii) of the Act or a removal country described in section 241(b)(2)(E)(i)(iv) of the Act. See 8 CFR 241.15.

8 CFR 1208.16 (b)

(b) Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof. The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

(1) Past threat to life or freedom. (i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or

(B) The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) In cases in which the applicant has established past persecution, the Service shall bear the burden of

establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (b)(1)(i)(B) of this section.
(iii) If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm.

(2) Future threat to life or freedom. An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:
(i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on

account of race, religion, nationality, membership in a particular social group, or political opinion; and
(ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.